Supreme Court, U.S.
FILED
JUN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1662

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

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of Philadelphia County;
DONALD T. VAUGHN, Superintendent,
State Correctional Institute at
Graterford, and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania
Petitioners

V.

JAMES CLARK,
Respondent

PETITIONERS' REPLY ON THE ISSUE OF WAIVER

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QUESTION PRESENTED

Have petitioners in this habeas corpus appeal waived a defense under Rule 9(a) where that defense first became applicable only after the Third Circuit Court of Appeals in its opinion below reinterpreted pertinent state law to impose an affirmative burden of proof on petitioners, which did not previously exist, and which the Third Circuit itself recognized was not capable of being met by petitioners due to the passage of time?

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Contrary to respondent's contention, waiver considerations do not preclude this Court's review of petitioners' Rule 9(a) argument. According to respondent, petitioners waived any argument under Rule 9(a) by not raising the objection in the District Court or in the appeal to the Circuit Court. This argument must be rejected however, since it ignores the fact that the Rule 9(a) objection became applicable only after the

Third Circuit in its opinion substantially reinterpreted state law to impose an affirmative burden on petitioners to produce facts which could no longer be proven due to the passage of time from respondent's trials.

The interpretation given state law by the Third Circuit had not been the interpretation governing in either the state courts or the District Court below. Those courts interpreted the applicable state statute to require a showing by the defendant that it "appeared" to the adult court that the defendant was a child. The defendant's failure to object on the ground of his juvenile status, or his failure to correct the court's otherwise erroneous judgment as to the defendant's age precluded relief on this basis under this interpretation, even if the adult court's judgment proved by hindsight to be

erroneous. See Commonwealth v. Sims, 379 Pa. Super. 252, 549 A.2d 1280 (1988).

It was conceded by both parties in this case that neither respondent nor his attorney raised an objection at trial based on respondent's juvenile status. Since that dispositive fact was conceded, petitioners reasonably did not raise an objection in the District Court based on Rule 9(a).

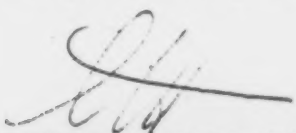
The Third Circuit in its opinion radically reinterpreted prior state law. It imposed a burden on the trial court to inquire into the juvenile status of any defendant before it; and it also placed the burden on the prosecution to prove that the inquiry had occurred. It is to this new interpretation, and its evidentiary requirements, that petitioners' Rule 9(a) objection applies. Had the Third Circuit remanded the case to the District Court for hearings in light of

its new interpretation, petitioners would have raised a Rule 9(a) objection. Since the Third Circuit chose instead to decide the merits of the case without a remand based on its own finding that petitioners could not meet that burden, petitioners had no opportunity to raise their Rule 9(a) objection, other than in a petition for rehearing, which was promptly filed, but denied. Since petitioners raised the Rule 9(a) objection at the first opportunity after it became relevant in the case, they did not waive the right to argue Rule 9(a), nor is this Court precluded from addressing the Rule 9(a) issue based on waiver.

CONCLUSION

For the foregoing additional reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision of the Third Circuit.

Respectfully submitted,



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